IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 550

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EDWARD R. ADAMS,
JOSEPH C. LAMY,
One North LaSalle Street,
Chicago, 2, Illinois,
HUGH V. MURRAY, JR.,
Centralia, Illinois,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. .....

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, George F. Wood, H. Glen Wood, Grace Schmidt and Leaffia Howe, respectfully pray for a writ of certiorari to review a final judgment of the Supreme Court of Illinois, the highest court of that State, entered on Sep-

tember 21, 1943. The judgment is the final act of the highest court in the Judicial Department of the State of Illinois and the last forum under the laws of that State in which petitioners may be heard in support of their rights. This petition, together with a certified transcript of the record of the case, are filed in this court within the prescribed three months.

I.

Summary and Short Statement of the Matters Involved.

This is an original suit commenced in the Circuit Court of Jefferson County, Illinois, for the purpose of cancelling, as a cloud upon the title to forty acres of land, a certificate of purchase and deed executed by the Master in Chancery of the Circuit Court of that county purporting to convey the land, to redeem from a decree for foreclosure entered therein and to cancel and remove other conveyances and recorded instruments as clouds upon the title to the land.

On October 20, 1931, William C. Wood and Margaret Wood, his wife, were the owners as tenants in common of a homestead consisting of forty acres of land in Jefferson County, Illinois. On that day they executed a mortgage of the land which was assigned to the respondent First National Bank of Woodlawn. On February 5, 1932, Margaret Wood died intestate leaving as her heirs, William C. Wood and her children who are the petitioners (Rec. 2, 3, 27, 49).

On November 29, 1935, First National Bank of Woodlawn commenced a suit to foreclose the mortgage in the Circuit Court of Jefferson County (Rec. 193-204). Personal service was obtained upon William C. Wood and the petitioners, H. Glen Wood, Grace Schmidt and Leaffia Howe. An effort was made to obtain service by publication on the petitioner, George F. Wood and wife (Rec. 205-210). Petitioner, H. Glen Wood, entered his appearance and filed

an answer through his counsel, Hassel B. Smith, (Rec. 211-213). The other defendants, including the petitioners herein other than H. Glen Wood, did not appear.

Rule 7 of the rules governing the Second Judicial Circuit of Illinois, in which Circuit is included the Circuit Court of Jefferson County, Illinois, in force and effect July 10, 1934, provides that except in cases of default, no order shall be entered in any cause without the presence of opposing counsel or upon proof of service of written notice upon attorneys of record for such opposite party (Rec. 354). Thus, H. Glen Wood's counsel became thereafter entitled to receive notice with respect to any subsequent order in the case.

On July 13, 1936, a decree for foreclosure was entered (Rec. 214-222). The decree required the defendants in the suit to pay the respondent bank the sum of $693.20 within thirty days and provided, in default thereof, that the land be sold at public vendue for cash in hand to the highest bidder at the west door of the Court House. The decree directed the Master in Chancery to execute the decree and give public notice of the time and place of the sale by publication of the same in a secular newspaper published in the county and posting notices as the law requires (Rec. 218, 219). Section 3 of the Illinois Statute, "Notices," effective September 13, 1874, provides:

> "Whenever notice is required by law or order of court and the number of publications is not specified, it shall be intended that the same be published for three successive weeks." (Illinois Revised Statutes, State Bar Association Edition, Chapter 100, Section 3.)

The Master in Chancery advertised the sale, (Rec. 306-308) and on September 5, 1936, the sale was held at the appointed time and place. At the sale the attorney for respondent bank bid the sum of $782.80 and petitioner, H. Glen Wood, bid the sum of $800 and this bid being the high-

est and best bid at the sale, the property was struck off to him and he was declared to be the purchaser and the sale was closed and the bidders ~~disbursed~~ dispersed (Rec. 132-136, 138, 144-145).

Petitioner, H. Glen Wood, failed to make payment of the amount of his bid and on September 21, 1936, the Master in Chancery wrote a letter to him stating that H. Glen Wood had bought the property and had failed to make payment of the sale price and that the Master in Chancery would allow him until the last of September to pay the sale price (Rec. 222, 223). Thereafter, on October 1, 1936, the Master in Chancery, without another advertisement and without conducting any other sale, filed a report of sale reciting that the mortgaged property had been sold to the First National Bank of Woodlawn for $782.80 and reciting further that the bank was the highest bidder at the sale (Rec. 224-225). This report was absolutely false (See opinion of Supreme Court of Illinois, Rec. 376, 377).

No action was taken to secure approval of the report of sale for nearly five years. The disposition thereof is hereinafter referred to. On the same day the Master in Chancery executed a Certificate of Purchase to the bank containing the same recitals (Rec. 226-227).

No further notice of any kind or character was given to petitioner, H. Glen Wood, or to his attorney, Hassel B. Smith, with respect to any proceedings or orders in the case subsequent to the public notice of the time, place and conditions of the foreclosure sale held on September 5, 1936.

On December 9, 1937, the Master in Chancery executed and delivered to First National Bank of Woodlawn a Master's Deed purporting to convey the property (Rec. 228, 229), and on the same day filed a Report of Conveyance (Rec. 312). The filing of this report was noted on

January 10, 1938, by the Circuit Court of Jefferson County *ex parte* without prior notice to petitioner, H. Glen Wood, or his counsel (Rec. 314). By the rule of court above referred to, notice of the application for this order of court was required (Rec. 339).

On March 3, 1938, the bank executed an oil and gas lease describing the land in question to respondent Kingwood Oil Company (Rec. 235-241).

On June 10, 1941, the Circuit Court of Jefferson County entered an *ex parte* order purporting to approve the Report of Sale of the Master in Chancery which had been on file since October 1, 1936, without notice to the petitioner, H. Glen Wood, or to his counsel as required by the rule of court and without the knowledge of any of the petitioners (Rec. 230-231).

Subsequent to the entry of this order the respondent bank obtained a second deed to the property and through mesne assignments from the respondent Kingwood Oil Company, Walter Duncan, James Breuil, R. J. Fryer and R. F. Ratcliffe and Alfred J. Williams obtained assignments under which they claimed an interest in the oil and gas lease, and First National Bank of Woodlawn executed a mineral deed purporting to convey a one-half interest in the oil, gas and other minerals underlying the land in question, subject to the oil and gas lease, to respondent, E. A. Obering, who conveyed an interest therein to respondent, Walter Duncan (Rec. 242-291 and for Chronology thereof see Rec. 360).

On September 2, 1941, less than ninety days after the entry of the *ex parte* order purporting to approve the Master's Report of Sale of June 10, 1941, the redemption money was tendered and when the tender was refused the present suit was filed in the same court and the redemption money was deposited with the Clerk thereof on September 5, 1941 (Rec. 13, 33, 56).

The complaint in the instant suit alleged the foregoing facts and further alleged that the Master's Report of Sale and Certificate of Sale were false and untrue; that no sale of the land to respondent bank was ever made or consummated (Rec. 6), and that the purported Master's Deed executed by the Master in Chancery to First National Bank of Woodlawn on September 9, 1936 was absolutely void (Rec. 7) and that the conveyances and assignments previously mentioned are void and constitute clouds on the title to the land in question (Rec. 7-12). The complaint further alleged that the purported order approving the Master's Report of Sale which was entered on June 10, 1941 was entered without notice of any kind to petitioners and without affording petitioners any opportunity to be heard (Rec. 10), and that at the time said order was entered the Circuit Court of Jefferson County had no power to approve a sale which was never made (Rec. 11). The complaint further alleged that certain of the defendants had entered upon the real estate without right or authority or notice to plaintiffs and had caused to be drilled thereon certain test wells which were producing oil and gas in commercial quantities, which oil and gas was being marketed to an unknown purchaser (Rec. 13). The complaint prayed for an adjudication that the real estate in question was never sold pursuant to the decree or, in the alternative, that said alleged sale was void or, in the further alternative, that said alleged sale was not consummated until June 10, 1941, and that the plaintiffs had the right to redeem from said alleged sale (Rec. 15). The complaint further prayed for an adjudication that the Master's Deeds to First National Bank of Woodlawn and the conveyances and assignments executed by the bank to certain of the respondents and between certain of the respondents are null and void, or, in the alternative, subject to the rights of redemption of plaintiffs and subject to the

rights of plaintiffs in and to said real estate (Rec. 16). The respondent, First National Bank of Woodlawn, and the other respondents interposed motions to dismiss the complaint (Rec. 18-27), which were denied. The respondents then filed answers (Rec. 27-98) admitting certain allegations of the complaint, denying others, setting up several defenses including limitations, estoppel by acquiescence, waiver and laches and renewing their motion to dismiss. The answers of the respondents other than First National Bank of Woodlawn alleged further that they were purchasers for value without notice and that their interest in the land was free and clear of any claims by petitioners. Replies were filed to these answers (Rec. 99-120).

After a hearing the Circuit Court of Jefferson County denied petitioners the relief sought and dismissed the complaint (Rec. 121-126). An appeal was taken to the Supreme Court of Illinois where, at the March Term 1941, the judgment of the trial court was affirmed (Rec. 324-337). Petitioners filed an application for rehearing to the June, 1943 Term of the Supreme Court of Illinois (Rec. 342-352), which was granted (Rec. 369-370), and upon reconsideration of the cause the Supreme Court of Illinois again affirmed the judgment below on September 21, 1943 (Rec. 371-381) and thereafter denied petitioners' motion for stay of mandate pending disposition of this petition for certiorari (Rec. 381-382), which is the next proceeding in the case.

II.

Jurisdictional Statement.

The jurisdiction of this court is based upon 237b of the Judicial Code as amended (28 U. S. C. A. 344b). The Supreme Court of Illinois, on September 21, 1943, affirmed the judgment of the Circuit Court of Jefferson County in

favor of the respondents herein and against the petitioners, 383 Ill. 515. The second opinion was filed after the allowance of a petition for rehearing, but since the second opinion directed the entry of the same judgment as the first opinion another petition for rehearing could not be filed. (*Barrett* v. *Shanks*, 382 Ill. 434, 443-444.) This petition is filed in this court within three months of the entry of judgment in the Supreme Court of Illinois.

At the outset in the complaint filed in the Circuit Court petitioners set up their Federal claims. It is alleged that petitioners had no notice of the filing of the false report of sale or of the contents thereof or of the execution and delivery of a certificate of purchase to respondent bank (Rec. 6), and no notice of or opportunity to be heard with respect to the final judgment entered in the cause on June 10, 1941 approving the false report of sale (Rec. 10). Such is an ample presentation of the Federal claim for adjudication (*Bridge Proprietors* v. *Hoboken Land and Improvement Company*, 1 Wall. 116, 143, 17 L. Ed. 571, 575; *St. Louis Iron Mountain & Southern Railway Company* v. *Starbird*, 243 U. S. 592, 598, 37 St. Ct. 462, 61 L. Ed. 917, 922).

The orders entered without notice deprived petitioners of an opportunity to appear and to be heard and to defend and expose the falsity of the master's report of the alleged sale approved by said orders, and the refusal of the Supreme Court of Illinois to adjudge that the orders are void likewise deprives petitioners of an opportunity to be heard and to defend their property rights and violates petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States *Hovey* v. *Elliott*, 167 U. S. 407, 417, 42 L. Ed. 215, 221; *Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077, 55 S. Ct. 579; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259; *Windsor* v. *McVeigh*,

93 U. S. 274, 282, 23 L. Ed. 914, 917; *Scott* v. *McNeal*, 154 U. S. 34, 50, 38 L. Ed. 896, 903; *Brinckerhoff Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114; *Coe* v. *Armour Fertilizer Works Co.*, 237 U. S. 412, 423, 59 L. Ed. 1027, 1031.

The affirmance of the decree of the trial court in its wrongful refusal to adjudge that the orders are void is in effect a holding that the orders are *res adjudicata* with respect to the issues raised in the instant suit and deprived petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (*Hansberry* v. *Lee*, 311 U. S. 32, 85 L. Ed. 22, *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917.)

The affirmance of the decree of the trial court necessarily deprived the petitioners of their rights and property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States because their property was taken without affording to them any opportunity to expose the fraud of the master. (*Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 12, 17, 51 L. Ed. 345-348.)

The action of the Master in Chancery below in the filing of a false report with respect to the sale held September 5, 1936, and the failure to give notice thereof resulted in the creation of a matter in issue in said master's report not to have been anticipated by petitioners and to that extent constituted a violation of the petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. (*Reynolds* v. *Stockton*, 140 U. S. 254 at 271, 35 L. Ed. 464 at 469.)

Under the law of Illinois in mortgage foreclosure proceedings there is no sale under a foreclosure decree unless

and until the public auction is held and a report thereof is filed and the report is approved and confirmed by the court (opinion of Supreme Court Rec. 376; *Straus* v. *Anderson,* 366 Ill. 426, 432; *Levy* v. *Broadway-Carmen Bldg. Corp.,* 366 Ill. 279, 286; *Ryerson* v. *Apland,* 378 Ill. 472, 474). The Master in Chancery in his report of sale specified that the sale was subject to the approval of the court (Rec. 307). Accordingly it is the order relied upon as approving the report of sale which is effective to deprive the petitioners of their property. It is not pretended that petitioners had notice of any order entered subsequent to the public auction and it is submitted that petitioners had no opportunity to be heard with respect to the orders of court which took their property from them. Notwithstanding this the Supreme Court of Illinois declined to hold the imaginary sale reported by the master and the orders relied on as approving such fabricated sale void, and declined to rule on the assertions here made, thereby also refusing and declining to protect the rights, titles, privileges and immunities claimed by petitioners under the Fourteenth Amendment of the Constitution of the United States which were necessarily drawn in question (*Chicago, Burlington & Quincy Railroad Company* v. *City of Chicago,* 226 U. S. 226, 233, 41, L. Ed. 979, 983-984; *Roby* v. *Colehour,* 146 U. S. 153, 37 L. Ed. 922, 924).

The petitioners raised the federal claims sought to be reviewed by alleging in their complaint that no notice with respect to the purported master's report of sale and master's certificate of purchase and deed were given to or received by them (Rec. 6, 10), and petitioners urged in their brief and argument to the Supreme Court of Illinois that the court below erred in refusing to decree that the master's report of sale and the certificate of purchase and deed executed by the Master in Chancery were a nullity and void and urging that the trial court was without power

to approve the alleged sale reported in said master's report of sale and urging that the purported sale so reported was a nullity, and the Supreme Court of Illinois in its decision rendered at the March Term 1943, agreed that the proceedings in question were erroneous, but refused to declare the proceedings void (Rec. 331-333).

The petitioners then filed their application for rehearing urging that the action of the court below disclosed a flagrant violation of their rights to their day in court and that the action of the Master in Chancery and counsel for respondent, First National Bank of Woodlawn, Illinois, had deprived the Circuit Court of Jefferson County of the ability to protect the rights of litigants in connection with the false report of sale (Rec. 351, 352), but the Supreme Court of Illinois, in its decision and opinion in connection therewith of September 21, 1943, has declined to make any ruling on the validity of said order and instead adopts non-federal grounds (Rec. 373-379) without substantial support in fact or in law as the basis for affirmation of the judgment below, thus expressly failing and refusing to protect the rights and property of the petitioners from violation of the 14th Amendment to the Federal Constitution with respect thereto (*Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758).

The affirmance by the Supreme Court of Illinois of the decree of the trial court, which had ruled adversely on the federal constitutional questions presented by the petitioners, necessarily involved substantial federal questions, the disposition of which were necessary to a proper determination of the case.

III.

Questions Presented.

1. Where a Master in Chancery at a public sale held pursuant to public notice pursuant to the terms of the foreclosure decree strikes the property off to the highest bidder at such sale and thereafter, because such highest bidder fails to make good his bid within the time specified by the Master, may the Master, consistently with the Fifth and Fourteenth Amendments of the Constitution, in his own discretion and without notice to any one, report a sale which was never made and issue a certificate of purchase of such fabricated sale and in due course and also without notice, issue a deed conveying the mortgaged premises to the purchaser at the imaginary sale?

2. Where the rules of court require that notice of all motions shall be given to opposing counsel, and counsel for one party obtains the entry of an order disposing of property rights without giving any notice to the other party who is represented by counsel, is the order entered on the motion valid or void and of no effect?

3. Are the order so entered without notice, as aforesaid, and the master's sale approved by said purported order subject to collateral attack in an independent suit?

4. Whether the action of the trial court and the affirmance of the Supreme Court in refusing to adjudicate that the purported order approving the master's report of sale which was entered without notice are so plainly arbitrary, unreasonable and contrary to law as to amount to a spoliation of the petitioners and deprivation of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution?

5. Whether the judgment of the trial court and its

affirmance by the Illinois Supreme Court without any evidence whatever as to notice to support the purported order approving the master's report of sale are so plainly arbitrary and contrary to law as to amount to a spoliation of the petitioners and a capricious and arbitrary judicial seizure of their property and a denial of their rights without due process of law in violation of the 14th Amendment to the Federal Constitution?

6. Whether the decision and opinion in connection therewith of the Supreme Court of Illinois in failing and refusing to rule on the issue squarely presented by the pleadings and the evidence to-wit: the validity or invalidity of the purported order approving the master's report of the alleged sale, and instead basing its decision upon a non-substantial and illfounded non-federal question, which ground is itself at variance with previous holdings by the Supreme Court of Illinois, as well as by the Supreme Court of the United States, is so plainly arbitrary, contrary to law and capricious as to amount to a mere spoliation of the petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the Federal Constitution?

7. Whether the judgment and opinion in connection therewith of the Illinois Supreme Court that plaintiff has another remedy when, as a matter of fact and law, plaintiff has no other remedy, which fact is recognized by the opinion, whereas petitioners' action was the proper remedy as supported by a long line of decisions in the courts of Illinois and in the Supreme Court of the United States, is so arbitrary, contrary to law and capricious as to amount to a spoliation of the petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the Federal Constitution?

8. Can there be innocent third party purchasers for

value without notice when the record of the foreclosure proceedings fails to disclose notice preceding confirmation of the sale and confirmation is delayed for nearly five years after the alleged sale in question?

IV.

Reasons Relied on for the Allowance of the Writ of Certiorari.

1. The decision of the Supreme Court of Illinois in affirming the decree of the court below is not in accord with the following applicable decisions of this court: *Stuart* v. *Gay*, 127 U. S. 518, 527, 32 L. Ed. 191, 194; *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914, 917; *Pacific Railroad of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505, 519, 28 L. Ed. 498, 504; *Pacific Railroad Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932, 935.

2. The decision of the Supreme Court of Illinois in holding that the instant suit could not be maintained because it amounts to a bill of review, which is not sustainable under the circumstances, is not in accord with the decision of this court in *Pacific Railway of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505, 519, 28 L. Ed. 498, 504, in which this court held that in an independent action inquiry could be made into allegations of fraud in connection with an order confirming a foreclosure sale under circumstances where the complaining parties were bound by the consent of an attorney in connection with such approval, and this court overruled a demurrer to a complaint setting forth these facts. The decision of the Supreme Court of Illinois in holding that the purported sale in question here would have been vulnerable to attack in a direct proceeding is not in accord with the decision of this court in *Pacific Railroad Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L.

Ed. 932, 935, which holds that on appeal this court must take the case as it comes in the record and receive no new evidence. Since the term of court at which the purported order approving the master's report of sale was entered had expired, there was no way within which petitioners could have made a record showing the invalidity of the proceedings in question except by way of collateral attack thereon.

3. The decision of the Supreme Court of Illinois in failing and refusing to hold that the purported order approving the master's report of sale which was entered on June 10, 1941 without notice was in fact void is not in accord with the decision of this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 917, to the effect that a final order which is entered without affording the adverse party an opportunity to appear and be heard in connection with the entry of such an order is a violation of constitutional rights, null and void and subject to collateral attack. In that case on an *ex parte* motion the court entered an order striking the defendant's answer from the files entering judgment in favor of plaintiff while the defendant was prevented from coming into the jurisdiction of the court trying the cause.

4. The decision of the Supreme Court of Illinois in failing and refusing to hold that an order entered without notice in violation of a rule of court requiring notice to be served upon the attorney of record for opposing parties constitutes such order a void order, is also not in accord with the decision of this court in *Windsor* v. *McVeigh*, *supra*.

5. The decision of the Supreme Court of Illinois in holding that the Master in Chancery, under the facts existing in the present case, may ignore the highest bidder at the foreclosure sale and instead of applying for instructions to the court with respect to the bidder's default summarily sell the property to a lower bidder without further

notice is not in accord with the decision of this court in *Stuart* v. *Gay*, 127 U. S. 518, 522, 32 L. Ed. 191 at 194, in which this court cited Daniells Chancery Practice 1282, Chap. 29, Sec. 1, and *Campbell* v. *Gardner*, 11 New Jersey Equity, 424, with approval, to the effect that the proper practice is for the plaintiff to obtain an order for resale and upon the purchaser to pay the expenses and any deficiencies in price arising upon the second sale. The decided cases in Illinois are to the same effect (*Hill* v. *Hill*, 58 Ill. 239, 242). The court also might summarily require the successful bidder to pay the amount of his bid enforcing such order by process for contempt if necessary (*Wakefield* v. *Wakefield*, 256 Ill. 296, 301).

A certified copy of the record in said suit in the Supreme Court of Illinois, including the abstract of record, proceedings, opinion and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of the Rules of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of Illinois commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record and all the proceedings had in case numbered and entitled to its docket as No. 26870, "George F. Wood, *et al.*, Appellants *vs.* First National Bank of Woodlawn, *et al.*, Appellees" and that said opinion and judgment of the Supreme Court of Illinois may be reversed by this court with directions that this cause be remanded to the Circuit Court of Jefferson County, Illinois, for the entry of a decree granting the relief prayed by petitioners in their complaint in that court and that petitioners may have

such other and further relief in the premises as to this Court may seem just.

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
Attorneys for Petitioners.

Attorney of Record.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Opinion of Court Below.

The opinion of the Supreme Court of Illinois is reported in 383 Ill. 515, of the Illinois Reports and is included in the record filed in this cause (Rec. 371).

Jurisdiction.

1. The jurisdiction of this court is based upon Judicial Code, Section 237b as amended by the Act of February 13, 1925. Federal Code Annotated, Title 28, Section 344b.

2. The date of the judgment to be reversed is September 21, 1943 (Rec. 371).

3. The Fifth and Fourteenth Amendments to the Constitution of the United States were drawn in question by the petitioners who specially set up and claimed rights, privileges and immunities thereunder which were denied by the courts below in their rulings.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari which also contains a full statement of the questions presented and, in the interest of brevity, are not repeated here. Any necessary elaborations on the evidence on the points involved will be made in the course of argument which follows.

Specification of Errors.

The Supreme Court of Illinois erred:

(1) In affirming the judgment of the Circuit Court of Cook County which dismissed the complaint of petitioners in that court;

(2) In refusing to grant to petitioners the relief prayed for in petitioners' complaint in the court below;

(3) In refusing to decree that petitioners are entitled to redeem under the statute;

(4) In refusing to decree that appellants are entitled to redeem in equity;

(5) In refusing to decree that the Master's report of sale and the certificate of purchase and deed executed by the Master in Chancery were a nullity, void and a cloud upon the title of petitioners;

(6) In refusing to decree that the order entered on June 10, 1941, approving the Master's report of sale was void for lack of notice prior to the entry thereof and subject to collateral attack;

(7) In refusing to decree that the oil and gas leases and deeds executed by respondents are void and clouds upon the title of petitioners.

SUMMARY OF ARGUMENT.

I.

This Court Has Jurisdiction to Review This Cause Because a Federal Question Was Involved in the Decision of the State Court.

Windsor v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917.

Reynolds v. *Stockton*, 140 U. S. 254, 265, 35 L. Ed. 464, 468.

Smith v. *Woolfolk*, 115 U. S. 143, 149, 29 L. Ed. 357, 360.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 59 L. Ed. 1027, 1032.

Ward v. *Love County*, 235 U. S. 17, 22, 64 L. Ed. 751, 759.

Terre Haute and Indiana Railway Company v. *Indiana ex rel Ketchum*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129.

Truax v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

Kansas Southern Railway Company v. *C. H. Albers Commission Co.*, 223 U. S. 573, 593, 56 L. Ed. 556-566.

Creswill v. *Grand Lodge K. P.*, 225 U. S. 246, 261, 56 L. Ed. 1074, 1081.

II.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was a Void Sale.

Williamson v. *Ball*, 8 Howard (U. S.) 566, 12 L. Ed. 1201.

Williamson v. *Berry*, 8 Howard (U. S.) 495, 528, 548, 12 L. Ed. 1170, 1185-1193.

Shriver's Lessee v. *Lynn*, 2 Howard (U. S.) 43, 11 L. Ed. 172.
Welch v. *Louis*, 31 Ill. 446, 457.
Quick v. *Collins*, 197 Ill. 391, 394, 64 N. E. 288.
Armstrong v. *Obucino*, 300 Ill. 140, 143, 133 N. E. 58.
Hall v. *American Bankers Ins. Co.*, 315 Ill. 252, 256, 146 N. E. 137.
Reynolds v. *Wilson*, 15 Ill. 395, 396.

III.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was Contrary to the Terms of the Decree of Sale Entered in the Foreclosure Proceedings.

Williamson v. *Ball*, *supra*.
Shriver's Lessee v. *Lynn*, *supra*.
Freeman on Void Judicial Sales, Section 21.
Quick v. *Collins*, *supra*.
Reynolds v. *Wilson*, *supra*.

IV.

Other Respondents Have Not Acquired Any Rights in the Subject Matter Which Entitles Them to the Status of Bona Fide Purchaser.

Logue v. *Von Alman*, 379 Ill. 208, 223.
Thayer v. *Village of Downer's Grove*, 369 Ill. 334, 339.
Whitaker v. *Miller*, 83 Ill. 381, 385.
Forcum v. *Brown*, 251 Ill. 301, 314.
Williamson v. *Ball*, *supra*.

V.

Petitioners Were Not Guilty of Laches.

Sutherland v. *Reeve*, 151 Ill. 384.
Roby v. *Colehour*, 146 U. S. 153, 37 L. Ed. 922, 924.
Coolidge v. *Rhodes*, 199 Ill. 24.

ARGUMENT.

I.

This Court Has Jurisdiction to Review This Cause Because a Federal Question Was Involved in the Decision of the State Court.

A long line of decisions of this court has firmly established the following propositions with respect to the requirements of the 5th and 14th Amendments to the Constitution of the United States.

1. They extend to the judicial branches of the governments of the several states as well as to the executive and administrative branches thereof.

2. The judicial branches of the several states shall accord to persons, against whom the judicial power is invoked, notice and an opportunity to appear in and defend against any action affecting their life, liberty and property and, conversely, that judgments entered against persons without notice and an opportunity to appear and defend are mere acts of judicial usurpation *coram non judice* and null and void.

3. Void judgments are subject to attack in any action in which they are called into question whether such attack be direct or collateral.

Opportunity to be heard within the concept of due process contemplates that parties to a judicial proceeding shall have a reasonable opportunity to make and obtain a hearing upon their claim or defense before a final judgment shall be entered; thus in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914-917, the striking of an answer previously filed by the defendant's attorney and the entry

of an *ex parte* judgment were held to be a violation of due process where the defendant was at the time within the confederate lines and unable to make further defense. Thus also in *Reynolds* v. *Stockton*, 140 U. S. 254, 265, 35 L. Ed. 464, 468, the obtaining of a personal judgment against a defendant who had filed an answer to a suit through an attorney was held to be a violation of due process, even though the motion for judgment was served upon his former attorney, because the personal liability phase of the suit had long lain dormant while the suit proceeded along other lines, thus inducing defendant to believe that the personal liability phase of the action had been abandoned, wherefore he failed to make further defense with respect thereto. Thus also in *Smith* v. *Woolfolk*, 115 U. S. 143, 149, 29 L. Ed. 357, 360, this court refused to accord recognition to a judgment based upon a claim instituted by a defendant against cross defendants pursuant to notice by letter after the main issues of the suit had been terminated because this court regarded the new claim as the institution of a new suit which required the service of process and the court pointed out that the Statutes of Arkansas did not provide for substituted service and that this court would not recognize the judgment if the Statutes did so provide. Thus, also in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 59 L. Ed. 1027, 1032, where an execution had been returned unsatisfied as against the corporate defendant and was then served upon a stockholder on the ground that he was indebted to the corporation for an unpaid stock subscription pursuant to the terms of a Florida Statute, this court held that the statute in affording to stockholders the right to appear and show why such execution should not be enforced against them did not satisfy the requirement that the state must require notice and afford the right and opportunity to a hearing before a judicial liability may be asserted against a person.

Where a federal question has been raised in a proper manner, it is within the province of this court to analyze the evidence bearing on the federal question and the decision of the state court in order to determine whether a federal right was actually denied in the state court, and this irrespective of the fact that the state court based its decision upon a non federal question if the non-federal question was unsubstantial or was wrongly construed to avoid the making of a decision denying a federal right. Thus, in *Ward* v. *Love County*, 235 U. S. 722, 64 L. Ed. 751, 759, where a right to exemption was claimed, this court held that the claimant of such objection was entitled to the judgment of this court as to whether said claim to exemption was denied or was not given due consideration, and this irrespective of whether the right was denied in express terms or denied in substance and effect as by putting forward non-federal grounds of decision that were without any fair or substantial support. Thus, also in *Terre Haute and Indiana Railway Company* v. *Indiana ex rel. Ketchum*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129, this court held that the state court sustained its decision on a wrong construction of a charter without relying upon the authority of unconstitutional legislation and noted that this method of disposing of the case by the state court would if allowed provide an easy method of defeating the jurisdiction of this court and then construed the constitutionality of the legislation in question. Thus also in *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259, this court held that where the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding of the state court to determine whether it is without substantial support, for if the rule were otherwise it would almost always be within

the power of the state court to prevent a review by this court. To substantially the same effect is *Kansas City Southern Railway Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 593, 56 L. Ed. 556, 566, which is cited in *Truax* v. *Corrigan, supra.* Likewise in *Creswill* v. *Grand Lodge, Knights of Pythias,* 225 U. S. 246, 261, 56 L. Ed. 1074, 1081, this court held that it had the power to examine the evidence where there was a claim of denial of a federal right accompanied by a contention that there was no evidence to support a finding of fact with respect thereto and where conclusions of fact and findings of law with respect to the federal question are intermingled.

In the foreclosure proceedings which are in question here petitioner, H. Glen Wood, after being served with process in the foreclosure proceedings, filed an answer to the complaint through his attorney (Rec. 211-13). Under the rules of the Circuit Court of Jefferson County then in full force and effect, his attorney thereupon became entitled to receive previous written notice with respect to the entry of any subsequent order (Rec. 211-213, 363; Rule 7). The report of the Master in Chancery with respect to the purported sale of September 5, 1936, which was filed in the Circuit Court of Jefferson County on October 1, 1936, was false and its purported *ex parte* approval nearly five years later not only took from H. Glen Wood his status of successful bidder and party entitled to a certificate of purchase upon payment of the bid price, but also deprived him and the remaining petitioners herein of their statutory right of redemption. The order in question was a final and appealable order and its effect unless judicially condemned is to deprive petitioners of their interest in the property in question. It is submitted that said order was subject to the protection of the due process requirements of the 5th and 14th Amendments to the Constitution of the United States, and the failure to serve

H. Glen Wood's attorney with notice of the motion for approval of said false master's report, which failure was itself in violation of an express rule of court, or the failure otherwise to afford H. Glen Wood with a reasonable opportunity to appear and defend with respect thereto was a denial to him of due process of law such as to make the *ex parte* order of June 10, 1941 a mere act of judicial usurpation *coram non judice*, null and void and subject to attack whenever called in question.

In *Pacific Railway of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505 at 519, 28 L. Ed. 498 at 504, which was an independent bill to impeach a foreclosure sale and confirmation thereof on the ground that the mortgagor and the plaintiff had been guilty of fraud prior to the sale and confirmation, and pursuant to the plan of fraud, the attorney for the mortgagor consented to the entry of the order confirming the sale this court overruled a demurrer to the bill and remanded the cause for further proceedings.

The federal question was necessarily involved in the instant suit from its inception. The complaint alleged the failure of notice with respect to the order in question. The trial court, in its judgment dismissing the action of petitioners, necessarily denied the federal right in question. The Illinois Supreme Court, in its original decision and opinion in connection therewith on the federal question, based its ruling upon the ground that the sale proceedings in question were not void, but merely voidable, and were not subject to collateral attack, thus in effect denying the federal right. On rehearing the state court ignored the federal question, choosing to place its decision upon the grounds that: (1) the instant suit is a bill of review, which it is not, but that it does not meet the recognized requirements of a bill of review, and (2) that it is a bill to redeem, which it is in part, but that the false report of the master

does not constitute such fraud as to entitle petitioners to redeem. Thus the state court has based a decision upon an unsubstantial non-federal issue, avoiding the making of a decision denying a federal right, but the denial of the federal right is necessarily involved. The facts with respect to the federal question in the instant case therefore fall squarely within the doctrine of *Ward* v. *Love, supra, Terre Haute and Indiana Railway Company* v. *Indiana ex rel. Ketchum, supra; Truax* v. *Corrigan, supra; Creswill* v. *Grand Lodge, Knights of Pythias, supra* and *Kansas City Southern Railway Co.* v. *C. H. Albers Commission Co., supra.*

It is therefore within the province of this court to analyze the evidence in the State Court on the federal question and the decision of the State Court in order to determine whether a federal right was actually denied.

The evidence with respect to the purported sale of September 5, 1936, the *ex parte* order of December 9, 1937, approving the master's report of conveyance and the *ex parte* order approving the false master's report of sale, taken in conjunction with the appearance and answer of H. Glen Wood through his attorney and the rule of the Circuit Court of Jefferson County requiring prior written notice to attorneys of record of subsequent orders and the false master's report itself, are all of the evidence in the record bearing upon the question of due process. There remains for analysis by this court the basis of the decision of the State Court.

The Bill of Review Theory.

The substance of the final opinion of the Supreme Court of Illinois is that the complaint is a bill of review, that a bill of review cannot be maintained because the facts in this case do not fit into one of the situations which the

peculiar chancery bills known as bills of review were employed to correct. The opinion proceeds from the basic premise that because the wrongs to be corrected by bills of review were limited, petitioners are not able to have their day in court to expose the fraud of the Master. The approach is precisely the same as the enforced reasoning of the early English courts under the formulary system of practice when a plaintiff was unsuccessful unless the wrong he sought to redress fell within a specified pattern of a limited number of available writs. Stripped of its sophistry the decision of the State Court is, in effect, a denial of constitutional rights because of an alleged failure of any remedy therefor. This pretext will not defeat the claim of violation of a constitutional right. *Brinckerhoff Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107.

For more than a decade there have been no such things as bills of review in the courts of Illinois. Section 31 of the Civil Practice Act, in force January 1, 1934, abolished the distinction between all actions and all pleadings in actions at law and suits in equity and required that all actions be commenced by a pleading designated "Complaint," (Illinois Revised Statutes State Bar Association Edition chapter 110, section 155). Thus the sole question in any case in Illinois under the Civil Practice Act is whether under the facts set forth in the complaint, judicial relief is justified.

The first pleading filed by petitioners in this suit in the Trial Court was entitled "Complaint." It was not entitled "Bill of Review". Thus the decision of the State Court is an outmoded refinement of chancery pleading which was abolished a decade before the instant suit was filed. This ground may not be interposed to defeat the substantial rights of litigants and to deprive them of their day in court and opportunity to be heard.

The method employed by petitioners to assert their rights, *i. e.*, an original action, was the only remedy available. If petitioners had been advised of the entry of the order of June 10, 1941 or any other order entered subsequent to the public auction on September 5, 1936 and had taken an appeal therefrom, they would have been bound by the record of the case in which the fraud of the Master did not appear. *Pacific Railway Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932, 935. Furthermore any attempt to vacate the order or orders in question in the court below in order to make up a record from which the fraud of the Master would appear was required to be made within thirty days from the date of the orders in question, after which the Trial Court lost jurisdiction over them (Illinois Revised Statutes State Bar Association Editor, chapter 77, section 84). The only other method of direct review of a judgment afforded by the Illinois courts is section 72 of the Civil Practice Act (Illinois Revised Statutes State Bar Association Edition, chapter 110, section 196). It was not possible for petitioners to proceed under this section for the reason that about one week before the entry of the order of June 10, 1941, the Supreme Court of Illinois had held this section applicable only to actions at law and not applicable to proceedings in chancery. *Frank* v. *Salomon*, 376 Ill. 439, 445, April 10, 1941, rehearing denied June 4, 1941, and see *Pedersen* v. *Logan Square State Bank*, 377 Ill. 408, 412, to the same effect. The situation then existing was analogous to the judicial question posed to the attorneys in *Brinckerhoff Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 74 L. ed. 1107.

The Bill to Redeem Theory.

The alternative title which the Supreme Court of Illinois arbitrarily applies to the complaint of petitioners is that of a bill to redeem (Rec. 373). The prayer for relief did seek to have the right of redemption established.

Under the Illinois Statute all land sold in a mortgage foreclosure is subject to redemption by the mortgagor for a period of twelve months (Ill. Rev. Stats., Chap. 77, Par. 18). The period commences to run "from said sale." In the Supreme Court of Illinois it was urged in argument that since no date could be given for the sale to the respondent bank the redemption period had either not commenced to run or petitioners had wrongfully been deprived of their right to redeem. As we have noted, under the Illinois decisions there is no sale until the sale is approved by the court. Within ninety days thereafter petitioners tendered the redemption money. The disposition the Supreme Court made of this contention is striking.

Since the court was unable to point to any day when there had been a sale of the property to the respondent bank it became necessary to adopt some subterfuge to defeat the right to redeem. The subterfuge adopted is the statement that the period commenced on January 10, 1938, at which time the court noted the filing of the master's report of conveyance. This is a novel doctrine without support in the Statutes and decisions in Illinois.

It is submitted that the state court sustained its decision through the medium of two misconstructions upon non-federal questions thus avoiding the ruling upon the federal question involved and for this reason this court has jurisdiction to review the proceeding in the state court in order to determine whether a federal question was in fact involved and denied.

Summary Disposition of the Fraud of the Master.

The opinion of the Supreme Court of Illinois sets forth that petitioners asserted that the fraud of the Master vitiated the sale (Rec. 375, 378). In fact petitioners' contention was that there had never been a sale pursuant to the foreclosure decree and the Master could not manufacture a sale. The opinion disposes of this contention by stating that the fraud of the Master does not invalidate the decree but like perjury is a fraud on the court which does not render the decree void.

It has long been the settled law that judgments or decrees obtained through artifices designed and operating to prevent the parties against whom they are rendered from receiving knowledge of the pendency of the action or steps taken therein will be set aside on the ground of fraud. Thus in *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, the court pointed out that where a party has been prevented from fully exhibiting his case by the fraud or deception practiced on him or where a party has no knowledge of proceedings being taken against him equity will relieve against the fraud and annul the former judgment or decree so as to give the defeated party his opportunity to be heard. To the same effect are all decisions in which the question has arisen. *Haddock* v. *Haddock*, 201 U. S. 562, 627; *U. S.* v. *Beebe*, 180 U. S. 343, 349, 45 L. ed. 563, 568; *T. G. Moss Tie Co.* v. *Wabash Railway Company*, C. C. A. 7th—Ill., 71 F. (2d) 107, 109; *Ferguson* v. *Wachs*, C. C. A. 7th—Ill., 98 F. (2d) 910, 918, and see the collection of cases 88 A. L. R. 1201. In the case of *Ferguson* v. *Wachs*, the Circuit Court of Appeals for the Seventh Circuit in an Illinois case in which an officer of the court failed to make a disclosure incumbent upon him said (loc. p. cit. 918):

> "The failure to perform the duty to speak or make disclosure which rests upon one because of a

trust or confidential relation is obviously a frau
for which equity may afford relief from a judgme
thereby obtained, even though the breach of du
occurs during a judicial proceeding and involv
false testimony and this is true whether such frau
be regarded as extrinsic fraud or an exception to t
extrinsic fraud rule."

II.

The Sale of the Mortgaged Premises to the First Nation Bank of Woodlawn Was a Void Sale.

It appears from the record and the opinion of the Sta
court that on September 5, 1936, the Master in Chancer
at a public sale held pursuant to the terms of a decree
foreclosure, struck off and sold mortgaged premises
H. Glen Wood (Rec. 132, 134, 136, 138, 145, 371, 372), th
Wood did not make payment, and that on September 2
1936, a letter was written by the Master to Wood, statin
that Wood had bought the property and demanding t
amount bid (Rec. 222). Thereafter on October 1, 193
the Master, without another advertisement and witho
conducting any other sale, filed a report of sale recitin
that the mortgaged property had been sold to the Fir
National Bank of Woodlawn, and that the bank was t
highest bidder at the sale (Rec. 224). On the same da
the Master issued a certificate of purchase containing t
same recitals (Rec. 226).

The conclusion is inescapable that the sale of the mor
gaged premises to the First National Bank of Woodlaw
did not occur on September 5, 1936, nor at any time betwe
September 5, 1936, and September 21, 1936, but that t
sale actually occurred on some date subsequent to Se
tember 21, 1936, and that the Master's report of sale a
certificate of purchase reciting that the sale therein

ported occurred on September 5, 1936, were false. There is no proof in the record and there is no claim that any public notice of a second public sale of the mortgaged premises to be held on any date subsequent to September 4, 1936, was given. At the sale held on September 5, 1936, which was the public sale, Wood was the successful bidder. Thus the sale by which the First National Bank of Woodlawn became the purchaser of the mortgaged premises was not a sale pursuant to public notice as required by the decree, but was the private act of the Master in Chancery at a later date, and was, in fact, a private sale.

It is unnecessary to prolong this petition by citing authorities to the effect that a private sale held pursuant to the terms of a decree requiring a public sale is void. *Williamson* v. *Ball*, 8 Howard (U. S.) 566, 12 L. Ed. 1200 at 1201; *Williamson* v. *Berry*, 8 Howard (U. S.) 495, 528-548, 12 L. Ed. 1170, 1185-1193; *Shriver's Lessee* v. *Lynn*, 2 Howard (U. S.) 43, 11 L. Ed. 172; *Welch* v. *Louis*, 31 Ill. 446, 457 (prior to N. E. Reporter Service); *Quick* v. *Collins*, 197 Ill. 391, 394, 64 N. E. 288; *Armstrong* v. *Obucino*, 300 Ill. 140, 143, 133 N. E. 58; *Hall* v. *American Bankers Ins. Co.*, 315 Ill. 252, 256, 146 N. E. 137; *Reynolds* v. *Wilson*, 15 Ill. 395, 396 (prior to N. E. Reporter Service). There are, of course, a number of cases, both federal and state, to the general effect that defects in a public notice with respect to a public sale or minor irregularities in the conduct of the sale will not render such sale void, and in its first opinion at the March, 1943, Term the Illinois Supreme Court relied upon a collection of cases to this effect. It is submitted, however, that there is not a single case anywhere in the accumulated body of the law affirming the validity of a sale by a Master in Chancery under circumstances remotely approaching the facts in this case.

III.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was Contrary to the Terms of the Decree of Sale Entered in the Foreclosure Proceedings.

The decree of sale in the foreclosure proceeding required the Master to "give public notice of the time and place of said sale by previously publishing the same in a secular newspaper in said county and posting notices as the law required" (Rec. 219).

The act in regard to notices (Ill. Rev. Stat., Chap. 100, Sec. 3) provides: "Whenever notice is required by law or order of Court, and the number of publications is not specified, it shall be intended that the same be published for three successive weeks."

It will thus be seen that the Circuit Court of Jefferson County required that any sale of the mortgaged premises be a public sale, and pursuant to publication for three successive weeks. The Circuit Court of Jefferson County had no power to authorize the Master in Chancery to conduct a private sale. The decree constituted the sole authority of the Master in Chancery to make the sale, and unless he followed the authority the sale could not be approved (*Williamson* v. *Ball*, 8 How. (U. S.) 566, 12 L. ed. 1200, 1201; *Shrivers Lessee* v. *Lynn*, 2 How. (U. S.) 43, 11 L. ed 172; Freeman on Void Judicial Sales, Sec. 21; *Quick* v. *Collins*, 197 Ill. 391, 394, 64 N. E. 188; *Reynolds* v. *Wilson*, 15 Ill. 395, 396 (prior to N. E. Reporter System).

The only theory under which it might be contended that the order approving the Master's purported report of sale could have the effect of validating the private sale to First National Bank of Woodlawn is that the Court, by reason of subsequent approval, in effect, modified the provisions of the decree of sale. Since the purported order approv-

ing the Master's report of conveyance was entered more than one year after the decree of foreclosure was entered, it is obvious that this theory is untenable, because the Circuit Court of Jefferson County lost jurisdiction to amend the decree of foreclosure after the expiration of 30 days. Thus, it is seen that the alleged approval of the reported sale is effective only to the extent that it is a modification of the decree for sale and it was beyond the power of the Circuit Court to alter or amend that decree in any respect after the expiration of 30 days. (Ill. Rev. Stat. State Bar Assn. Chap. 77, Sec. 84.) We further respectfully direct the Court's attention to the fact that the Master's report of sale (Rec. 224-225) failed to apprise the Circuit Court of the fact that any person other than First National Bank of Woodlawn had any interest in the subject matter presented to the Court for adjudication. For reasons best known to himself, the Master in Chancery, in his report of sale, failed to report the fact that at the sale held on September 5, 1936, the property had been struck off and sold to Wood. Thus, the Circuit Court of Jefferson County was, in effect, prevented from knowing the petitioner H. Glen Wood claimed any interest in the premises with respect to the sale in question and thereby was misled into assuming that First National Bank of Woodlawn, whose attorney presented the purported order approving the sale, was the only person interested in the subject matter. Through this device the Circuit Court of Jefferson County was not led to inquire into the question of notice to petitioner H. Glen Wood or his counsel in connection with the presentation of said purported order.

IV.

Other Respondents Have Not Acquired Any Rights in the Subject Matter Which Entitles Them to the Status of Bona Fide Purchaser.

The opinion of the Supreme Court at the March Term, 1943, held that the order of June 10, 1941 which purported to approve the false master's report of sale on file since October 1, 1936, was not void but merely voidable, and that by reason thereof respondent parties in interest were entitled to the status of bona fide purchasers for value without notice (Rec. 331). In its opinion of September 21, 1943, the State Court noticeably failed to make a ruling on the question of whether the order in question was void and consequently abandoned its previous declaration that respondent parties in interest acquired the status of bona fide third party purchasers for value without notice.

There can be no question but that First National Bank of Woodlawn, which was a party to the suit and whose attorney presumably participated in the proceedings therein, would not be entitled to the status of a third party purchaser for value without notice. With respect to the remaining respondent parties in interest, it is deemed advisable, notwithstanding that this question is not in issue in the final opinion of the State Court, to point out that such respondent parties in interest are not, in fact, entitled to the status of bona fide purchasers for value without notice.

As has heretofore been seen, the judicial proceedings were not regular, and that fact was apparent upon the face of the record. The chronology of events which clarifies the order was set forth in the petition for rehearing in the State Court and reference is hereby made thereto (Rec. 359).

The record of the foreclosure proceedings contains no proof of service of notices on opposing counsel and no order entered subsequent to the public sale held on September 5th finds that notice was given or that counsel for the opposing party was present in open court at the time of the entry thereof (Rec. 230-231).

The record furnishes ample evidence, furthermore, that the other parties in interest paid no attention to the state of the record, but, instead, relied upon a most superficial examination of the title by the attorneys for Kingwood Oil Company. On March 11, 1938, Kingwood Oil Company received a letter from Messrs. Scholfield and Purdunn, its counsel, advising that in their opinion based upon the incomplete material available for examination, First National Bank of Woodlawn was the owner of the property (Rec. 316-318). It is worthy of note that this opinion was rendered eight days after the execution of the oil and gas lease by First National Bank of Woodlawn and twelve days before the lease was recorded, and more than three years prior to the entry of the purported order approving the Master's report of sale. If, as respondents claim, they became good faith purchasers at that time, why did it become necessary three years later to apply for an order approving the fabricated sale and to obtain a fresh, new Master's deed? And if, as respondents claim, they proceeded under the halo of good faith, why did they not upon applying for an order of court give the notice of such application which the rules of court and the law required? It is submitted that this position of respondents does not withstand the searchlight of scrutiny which this court will apply.

The opinion of the State Court states that the approval of the report of conveyance of the Master cured all irregularities that preceded and which appeared on the face of the record, but this purported order was also entered without

notice to H. Glen Wood or his counsel and this failure of notice was easily ascertainable from an inspection of the record.

Notwithstanding the above discussion of the evidence, it is suggested that the evidence on the question was of no importance because the order in question was void, by reason whereof the Master's deed cannot be made the foundation of a good title until the Master's report of sale has been properly approved. In *Logue* v. *Von Alman*, 379 Ill. 208, 223, there was reaffirmed the rule existing in Illinois from the earliest times to the effect that a void deed passes no title and cannot be made the foundation of a good title, even under the application of the equitable doctrine that protects bona fide purchasers.

In *Thayer* v. *Village of Downer's Grove*, 369 Ill. 334, 339, it was held to be a well established rule that a void judgment or order may be vacated any time and that the doctrines of laches and estoppel do not apply. See also *Whitaker* v. *Miller*, 83 Ill. 381, 385; *Forcum* v. *Brown*, 251 Ill. 301, 314. That this is also the federal rule is amply demonstrated by the ruling of this court in *Ball* v. *Williamson*, 8 Howard (U. S.) 566, 567, 12 L. Ed. 1200, 1201.

V.

Petitioners Were Not Guilty of Laches.

It is respectfully submitted that it is an indispensable element in the application of laches that the party who is sought to be charged therewith must have had knowledge of the facts, and that the doctrine will not be applied where the party, against whom it is sought to charge laches, was, in fact, in ignorance of material facts connected with his rights (*Sutherland* v. *Reeve*, 151 Ill. 384; *Roby* v. *Colehour*, 146 U. S. 153, 37 L. ed. 922, 924; *Coolidge* v. *Rhodes*, 199 Ill. 24).

The record copy fails to disclose any evidence to indicate that H. Glen Wood knew that the Master in Chancery had filed a false report of sale, and that the Court had entered an order approving a subsequent sale to another person, and respondents nowhere make the contention that there was any such knowledge.

Conclusion.

It is respectfully submitted that the facts in this case disclose as flagrant a violation of the rights of parties litigant as to their right to a day in court as can be imagined. It would have been bad enough if a master's report of sale, reciting that the property had been sold to H. Glen Wood, had been set aside by the Circuit Court of Jefferson County without notice to H. Glen Wood; it would have been worse if a master's report of sale, reciting the bid by H. Glen Wood at the public sale and the subsequent private sale at a later date to the First National Bank of Woodlawn had been approved by the Court without notice, as in this case, the Circuit Court of Jefferson County would have been chargeable with a callous disregard for the rights of H. Glen Wood, but the actual facts make out a case much worse, for the procedure followed by the Master deprived the Circuit Court of Jefferson County of the ability to protect the rights of anyone and in this procedure, First National Bank of Woodlawn is equally culpable since it was the failure of the Bank's counsel to give notice to H. Glen Wood which misled the Circuit Court into believing that it had jurisdiction, and that there were no other parties in interest in connection with the false report of sale.

For the foregoing reasons the petition for certiorari should be granted and upon hearing of this cause the judg-

ment of the Supreme Court of Illinois and of the Circuit Court of Jefferson County should be reversed.

Respectfully submitted,

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
Attorneys for Petitioners.

.....

Attorney of Record.